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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1970

No. 6389

VINCENT CIMINO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner Vincent Cimino prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois affirming the jury trial conviction of possession of narcotics. The defendant was sentenced to a 5 to 10 year term in the Illinois State Penitentiary.

REFERENCE TO REPORTS OF OPINION.

People v. *Cimino*, ... Ill. 2d ....., 257 N.E. 2d 97, is attached as an Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS.

The judgment of the Supreme Court of Illinois was entered on March 24, 1970 and on April 21, 1970 the dissenting opinion of Mr. Justice Schaefer was received in the Office of The Clerk of the Supreme Court of Illinois. A Petition for Rehearing to the Illinois Supreme Court was filed and on May 27, 1970, "On the Court's own motion the mandate is recalled and stayed pending disposition of petition for rehearing." On October 6, 1970 the Petition for Rehearing was denied. Jurisdiction of this Court is invoked under Title 28 U.S.C., sec. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW.

1. In a State criminal prosecution does a comment by the prosecuting attorney in his closing argument that: *"As a matter of fact, the Defendant is Eligible for probation on this case."*, tend to diminish the jury's sense of responsibility and directly contravene the Sixth Amendment guarantee of a right to a fair and impartial trial? And,

   (a) If this form of argument is to be Constitutionally condemned would not the circumstances be even more compelling where, as in this case, the prosecutor knew that the accused was not eligible for probation?

2. The Petitioner and his companion were merely walking down the street at night approaching an intersection in Chicago. At this particular time the officers involved in this case were approaching the same intersection from another direction in an unmarked squad car. When the officers noticed the two men they recognized the Petitioner's companion as a known narcotics user. One of the officers then threw a spotlight on them and the squad car was stopped in the crosswalk blocking their path. Following this action by the officers, they observed the Petitioner raise his hand to his mouth and then lower it to his waist and release a tin foil packet, which was later identified as heroin. The facts are in the record and not disputed by the prosecutor; the only reason for shining the spotlight on the Petitioner and stopping the squad car directly in his path was solely because of his presence with a man known to the police as a user of narcotics.

The questions presented in light of the foregoing circumstances are:

(a) Did the indiscriminate use of a spotlight on the Petitioner and the contemporaneous blocking of his path with a squad car constitute a forceful show of authority by the police that amounted to a search and seizure of the Petitioner? And,

if under these circumstances, the conduct of the officers did constitute a search and seizure of the Petitioner,

(b) Does walking down a public sidewalk with a person known to use narcotics warrant a man of reasonable caution in the belief that the search and seizure was appropriate; or is such conduct nothing more substantial than the product of an inarticulate hunch premised upon guilt by association fostering an unconstitutional intrusion upon the personal security of the Petitioner without the evidentiary justification which the Fourth Amendment commands? And,

(c) Would not the sanctioning by this Court of the indiscriminate use of spotlights on the citizenry of this country provide the law enforcement agencies with an effective means by which to circumvent the guidelines carefully laid down in *Terry* v. *Ohio,* 392 U.S. 1, (1967), by permitting the police to prod the object of their spotlight scrutiny into creating the suspicious circumstances which would permit his "stop" and "frisk" and perhaps conclude in the eventual deprivation of his freedom?

CONSTITUTIONAL PROVISIONS INVOLVED.

Fourth Amendment:

"The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . ."

Fifth Amendment:

"No person shall be . . . deprived of life, liberty, or property, without due process of law."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . and to have the assistance of counsel for his defense."

Fourteenth Amendment:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED.

Illinois Revised Statutes, 1967, volume I, chapter 38, page 1561, paragraph 22-40 (Penalties). (pertinent text is attached as Appendix D.).

STATEMENT OF THE CASE.

On the evening of February 3, 1966, at approximately 11:30 p.m., the officers involved in this case were on a routine patrol in an unmarked squad car approaching the intersection of Bell and Potomac Streets in Chicago. (A. 31, 32; R. 50-52). As they neared the intersection, they noticed the Petitioner and his companion to their right proceeding towards them on the sidewalk. The street was sufficiently lighted to enable both officers to recognize the Petitioner's companion as a known narcotics user, who had previously been arrested by both officers. The Petitioner and his companion were approximately 25 to 30 feet from the squad car, when one of the officers threw the spotlight on them and stopped the squad car in the crosswalk directly blocking their path. Both officers testified that the only reason for initiating this action was because they recognized the Petitioner's companion as a person known to them to have used narcotics. The officers then stated that they observed the defendant raise his hand to his mouth and then lower it to his waist and release a tin foil packet, the size of a quarter, which landed in the snow. (A. 32-34, 43-45, 17, 50; R. 52-56, 111-116, 20, 21, 132). While the spotlight was kept on the suspects as they walked towards the squad car, one of the officers retrieved the packet and after determining that it appeared to be heroin, shouted to the other officer "Stop them, it's stuff." (A. 35; R. 56-57). After the Petitioner and his companion were searched and nothing was found on them, they were told to get in the backseat of the car while

one of the officers field tested the contents of the packet, which resulted in a positive reaction. The officers released the Petitioner's companion but retained the Petitioner in custody and processed him at the police station. Both testified to the foregoing facts in court. (A. 35, 44-46, 49; R. 56, 57, 114-119, 131).

The Petitioner filed a motion to suppress the packet of heroin, (A. 3-4; R. C6-7) which was denied, (A. 4, 28; R. 43) and the packet was received in evidence during the course of the trial. (A. 51; R. 141-146).

Whereupon the trial proceeded accordingly until following the Petitioner's closing argument, the Assistant State's Attorney commented to the jury during his closing argument that, "And as a matter of fact, the Defendant is eligible for probation on this case." The Assistant State's Attorney made this statement knowing to the contrary that the Petitioner was not eligible for probation. (A. 77, 81-83, 85-86; R. 209, 244-249).

The jury deliberated for three and a half hours and thereafter returned a verdict of "guilty as charged in the information." (A. 80, 85-86; R. 229, 259-260).

The Petitioner's post trial motion for new trial, which raised among its points those presented by this petition (A. 6; R. C14), was denied. (A. 86; R. 267).

The Petitioner was then sentenced to a term of five (5) to ten (10) years in the State Penitentiary. (A. 87; R. 274).

Following the sentencing of the trial court, the Petitioner duly prosecuted an appeal to the Supreme Court of Illinois which affirmed on all points including those presented by this petition, Justice Schaefer dissenting. A copy of that Court's opinion is attached as Appendix A.

On May 27, 1970 the mandate was recalled and stayed by order of the Supreme Court of Illinois pending disposition of the petition for rehearing, which incorporated the points raised in the instant petition. (App. B). The petition for rehearing was denied on October 6, 1970. (App. C).

Now, wherefore, upon the denial of the petition for rehearing, the Petitioner, Vincent Cimino, duly prosecutes this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT.

I.

THIS COURT MUST NO LONGER PERMIT STATE PROSECUTORS TO COMPROMISE AN INDIVIDUAL'S LIFE OR FREEDOM AND TO EQUIVOCATE THE SIGNIFICANCE OF THE JURY'S RESPONSIBILITY BY COMMENTING ON THE POSSIBILITY OF PROBATION, PARDON OR PAROLE FOR THE ACCUSED IN A CRIMINAL PROCEEDING.

This case presents substantial questions concerning this Court's "harmless constitutional-error rule" in relation to a particular form of prejudicial argument, employed by State prosecuting attorneys and sanctioned by a few State courts, which denies the accused his rights guaranteed by the Sixth and Fourteenth Amendments.

In 1953, when Vincent Cimino was about 17 years of age, he was convicted of possession of narcotics and put on probation for five years, which he completed without a violation. (A. 86; R. 268-269). At a pre-trial conference his past conviction was brought to the attention

of the Court. It was then determined that the petitioner would not be eligible for probation as proscribed in Chapter 38, Section 22-40, of the *Illinois Revised Statutes,* (1967). (App. D). In attendance at this conference was the Trial Judge, the Assistant State's Attorneys, the Petitioner, and Petitioner's attorney. (A. 81-83, 85-86; R. 244-260).

Following the Petitioner's closing argument, the Assistant State's Attorney commented to the jury during his closing argument that, *"And as a matter of fact, he is eligible for probation on this case."* (A. 76-77; R. 209). The Petitioner's attorney did not make an objection to this statement, and the Trial Judge failed to instruct the jury to disregard it. However, this error was brought to the attention of the Court in the Petitioner's Post Trial Motion. Having heard the arguments of counsel, the Trial Judge denied the Motion for New Trial. (A. 86; R. 237).

Unquestionably Petitioner has the constitutional right to a fair and impartial jury trial. As this Court made explicit in *Estes* v. *Texas,* 381 U.S. 532, 540, (1965),

> "That the due process requirements in both the Fifth and Fourteenth Amendments and the provisions of the Sixth Amendment require a procedure that will assure a fair trial. * * * the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs."

However, it is just as undeniable that State prosecutors by commenting on the possibility of probation, pardon or parole deny the accused this most fundamental of all freedoms. (Although the prejudicial comment complained of in this case was the prosecutor's reference to pro-

bation, the Petitioner respectfully submits that the *ratio decidendi* applies equally as well to references concerning pardon and parole).

In the case at bar, the court below specifically found, regarding the prosecutor's reference to probation:

> "While the comments exceeded the bounds of propriety, we do not think that under the circumstances of this case they were sufficiently prejudicial to call for a reversal. Where it appears that improper remarks do not constitute a material factor in the conviction, or that they are of such a minor character that prejudice to defendant is not their *probable* result, the verdict will not be disturbed." (App. A). (Emphasis added)

Although in this instance the court below found that reference to probation is of such a minor character that prejudice is not the probable result, *thirty-five years* of Illinois precedent holds to the contrary. *People* v. *Isbell*, 363 Ill. 264, 2 N.E. 2d 84, (1936); *People* v. *Klapperich*, 370 Ill. 588, 19 N.E. 2d 579, (1939); *People* v. *Burgard*, 377 Ill. 322, 36 N.E. 2d 558, (1941); *People* v. *Lynn*, 387 Ill. 549, 56 N.E. 2d 808, (1944). In essence the court below has overruled thirty-five years of Illinois precedent without any mention in the opinion that such an established concept was being overruled. Thus in affirming Petitioner's conviction, the Illinois Supreme Court has established precedent that will license prosecutors throughout the State to advise juries in all cases that the defendant before the bar is eligible for probation without fear of reversal on appeal.

Not only is the opinion of the court below in contradiction to established Illinois precedent, but it is also contrary to the greater weight and better reasoned author-

ity in the country. See 16 ALR 3d 1137. The State of Georgia has thought this form of argument so reprehensible as to warrant a statute, which provides for the mandatory granting of a mistrial if counsel in a criminal case should argue to or before the jury the possibility of pardon, parole or clemency of any nature. Ga. L. 1955 p. 191. To the same effect, the Supreme Court of North Carolina, citing the ALR Annotation above, has held that:

> "Any reference by the judge or prosecuting attorney to the possibility of a parole will constitute prejudicial error." *State* v. *Rhodes,* 275 N.C. 584, 169 S.E. 2d 846, 849, (1969).

There are two inherent evils in this form of argument: One going to jury determination of guilt and innocence and the other as to the penalty to be imposed.

As to guilt, prejudice results from leading the jury to evade its responsibilities and compromise on the question of guilt by way of reassuring the jury that if it makes a mistake, the consequences will not be overly serious, since relief by pardon, parole or probation is available. Another form of prejudice is manifested by way of arousing the jury's ire against criminals generally (including the accused, who is by implication grouped with others who have already been *convicted* of crime) by pointing out the manner in which they flout the law by escaping just punishment. (16 ALR 3d 1137, 1140). In *People* v. *Burgard,* 377 Ill. 322, at 330, 36 N.E. 2d 558, (1941), where the prosecutor commented to the jury that the law allowed the judge to grant probation, the court in reversing the conviction noted:

> "However, the inference was plain that the jury might assume that the court had the right to grant

> probation, and that the defendant might not be called upon to serve a penitentiary sentence."

See also *People* v. *Johnson*, 284 N.Y. 182, 30 N.E. 2d 465, (1940); *Shoemaker* v. *State*, 228 Md. 462, 180 A. 2d 682, (1962).

As to sentence, prejudice results from the inference to the jury to impose an excessive punishment in order to compensate for, or protect against the possibility of (probation), pardon or parole. 16 ALR 3d 1137, at 1141. The consequences of this type of argument are especially repugnant in those instances where the death penalty could be imposed. In *State* v. *Johnson*, 151 La. 625, 92 So. 139 (1922), the prosecutor in a murder trial commented to the jury that life imprisonment was a farce and history showed that after a short period of time, say 5, 10, or 15 years he (defendant) would be turned loose again on society. In setting aside the death sentence, the Louisiana Supreme Court stated:

> "In all prosecutions for capital offenses in this state, the discretionary power is vested in the jury to qualify its verdict by finding the accused guilty without capital punishment, which means life imprisonment. . . . In the exercise of this power the jury should be left free and untrammeled and should not be influenced by the personal opinion of the prosecuting officer as to the wisdom and expediency of the law, and the effect which, in his opinion, would result from a qualified verdict.
>
> • • • • •
>
> The remarks of the district attorney in plain English meant, and could only mean, this:
>
> The law which authorizes the jury to qualify its verdict, is a farce, and means nothing to you as jurors: you should hang the accused, and, if you do

> not, he will be paroled in a few years and let loose upon society. If you will send him to the gallows, he will be beyond the reach of the board of parole." *id.* 634.

There is a third vice which is uniquely associated with reference by the prosecutor to the possibility of probation for the accused. This particular form of argument by the State places defense counsel in an extremely disadvantageous position. If the defense attorney does not make an objection, then the jury is free to consider this prejudicial information during their deliberation. If, on the other hand, defense counsel objects, this serves only to impress the statement all the more firmly upon the minds of the jury and inclines them towards the belief that the accused is not eligible for probation because he has been *convicted* of a crime in the past. Therefore, when faced with this dilemma, the defense attorney is made to choose between the lesser of two evils and is forced not to make an objection.

In light of the inherent evils, the conclusion is inescapable, that commenting on the possibility of probation to the jury is highly prejudicial to the accused in a criminal prosecution and therefore warrants constitutional condemnation by this Court. Prosecutors should not be allowed in this manner to travel outside the record and argue facts before the jury which are not in evidence. Jurors should devote their undivided attention to determining the issue of guilt or innocence and they should not engage in speculation concerning the possibility of probation when a person's freedom hangs in the balance. In those cases wherein the jury determines the penalty, the Court in *Graham* v. *State,* 202 Tenn. 423, at 426, 304 S.W. 2d 622, (1957), stated:

> "The power to pardon, and/or commute a sentence of imprisonment as fixed by the jury, is foreign to the trial of any criminal case. The jury's exclusive duty to assess the punishment in all cases must be exercised fully according to the provisions of the appropriate statute and as given in charge by the trial judge. They cannot, under any circumstances, consider the power of the Governor to pardon, or the authority of the Parole Board to grant paroles. Nor can they speculate as to what this Court might do on appeal. . . . If the Rule were otherwise the verdict of the jury would be mere guesswork. Moreover, in such circumstances, this court would never be able to decide if the trial judge approved the verdict based on the facts, or on some unaccountable speculation as to the possibility of a reduction of the sentence by the Governor. Both the State and the defendant are entitled to a verdict that is based solely and alone upon the facts of the case and the law as given in charge by the court."

The reasoning of the court in *Graham,* supra, applies equally as well to comments on probation as illustrated by *State* v. *Rhodes,* 275 N.C. 584, 165 S.E. 2d 846, 848, (1969), wherein the court there stated:

> "The amount of punishment which a verdict of guilty will empower the judge to impose is totally irrelevant to the issue of the defendant's guilt. It is, therefore, no concern of the jurors."

In the instant case, the Assistant State's Attorney's reference to probation seriously prejudiced the Petitioner and denied him a fair and impartial trial. The inference is irrebutable, as was pointed out by Justice Schaefer in his dissent below, (App. A), when he stated:

> "The majority makes no attempt to justify this argument and its only purpose appears to be to diminish the jury's sense of responsibility by persuading

them that a verdict of guilty is not a significant matter because even if he is found guilty the defendant is not going to be punished."

The absence of an objection by the Petitioner's attorney and the failure of the Court below to instruct the jury to disregard it, no doubt had an influence with the jury and inclined them towards the belief that the statement was accurate and a proper line of argument to be considered during their deliberations. It cannot be safely concluded that the jury disregarded the comment (as to parole) by the prosecution and proceeded thereafter to a consideration of the question of the Defendant's guilt in the same frame of mind and the same attitude toward the case as though the statement had not been made. *People* v. *Lynn*, 387 Ill. 549, 555, 56 N.E. 2d 808, (1944).

The case at bar was close and proof of the Petitioner's guilt was far from clear and convincing. The closeness of the trial was exemplified by the *three and a half hours* the jury deliberated before it returned a verdict. (A. 85-86; R. 259-260). The harm done by the comment was left unchecked and its impact upon the determination of the jury was inescapable.

Petitioner submits that the mode of argument employed in this case should be constitutionally condemned for many of the same reasons which led this Court in *Griffin* v. *California*, 380 U.S. 609, (1965), to condemn comment on the accused's failure to testify. The evils inherent in the form of extrajudicial comment employed in the case at bar have been illustrated and how they operate in derogation of the Sixth Amendment guarantee to a fair and impartial trial. Since this particular form of argument places defense counsel in an extremely com-

promising position, to the extent that his hands are tied and he dare not object for fear of calling further attention to the error, the accused is denied his Sixth Amendment right to the effective assistance of counsel. In addition, this type of comment either diminishes the jury's sense of responsibility or results in their assuming the functions of the judge and the executive authorities and inclines them towards imposing a *penalty* on the defendant because of their speculation that clemency may be granted at some future date. As a consequence, the accused is denied due process of law and his right to a fair and impartial jury.

The court below admits that the prosecutor's argument was improper (App. 3a), but holds that it was harmless. We now take the opportunity to respectfully remind this Court of its statement in *Chapman* v. *California,* 386 U.S. 18, 22, (1967):

> ". . . we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one."

The Petitioner contends that the reference to probation in his case was highly persuasive to the jury and an important factor in his conviction and that this form of prejudicial comment should be constitutionally forbidden.

Therefore, the Petitioner urges this Court to hold that the Fifth and Sixth Amendments, in their bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the possibility of the accused's probation, pardon or parole, or instructions by the court to the same effect.

Should this Court hold that this form of argument is condemned by the Constitution, then the question as to whether it constitutes harmless-error becomes a federal one. As was pointed out by the Court in *Chapman*:

> "Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules and remedies designed to protect people from infractions by the States of federally guaranteed rights." *id.* 21.

Under the standard promulgated in *Chapman,* before this constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt.

The case at bar was close and proof of the Petitioner's guilt was far from clear and convincing. The closeness of the trial was exemplified by the three and a half hours the jury deliberated before it returned a verdict. The very nature of the comment itself and the failure of the trial judge to instruct the jury to disregard it, undoubtedly influenced the jury's determination of guilt. Even the findings of the court below show that prejudice to the defendant was not the *probable* result.

Therefore, upon applying the reasonable doubt standard as required by *Chapman* to the instant case, the Petitioner prays that Your Honors will reverse his conviction and constitutionally condemn the form of argument which lead to his imprisonment.

A. The Petitioner Was Not Eligible For Probation And The Prosecutor Was Aware Of This When He Advised The Jury That The Petitioner Was Eligible For Probation.

During a pre-trial conference attended by both State prosecutors in this case, the trial judge made it perfectly clear to all parties that the Petitioner would not be eligible for probation because of his prior conviction. (A. 81-86; R. 244-260) In spite of this, however, the State's Attorney saw fit to advise the jury to the contrary. (A. 77; R. 209).

In light of these circumstances, a serious question is raised as to the limitations which the Due Process Clause of the Fourteenth Amendment imposes on this form of conduct in criminal proceedings by the States.

Petitioner maintains that the conduct of the prosecutor in this instance denied him Due Process of Law. As this Court pointed out in *Rochin* v. *California,* 342 U.S. 165, 169, (1952), when it stated:

> "However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."

Earlier in this petition, the inherent evils replete in this form of argument were demonstrated. However, when these same evils are coupled with the fact, as in this case, that the accused is *not* eligible for probation, then the conduct complained of transcends the canons of

decency and offends traditional notions of fair play and substantial justice. As Justice Schaefer observed in his dissent below, when he remarked:

> "This argument is, in my opinion, clearly and deliberately prejudicial even if the facts were as the prosecutor stated. In this case the error is compounded, however, by the fact that the prosecutor's statement was not true." (App. A).

From what source can the States derive authority which permits their prosecutors to disregard the truth of matters argued before the jury and which results in the deprivation of an individual's freedom? The question, of course, begs the answer. None!

And in a criminal proceeding, could not a white lie told by the prosecutor develop into a malignancy that infects a juror's sense of responsibility until that juror no longer appreciates the significance of his constitutional duties as the trier of fact? And by way of an answer to this question, should the accused be the party required to bear the risk of this possibility?

The prosecutor below struck a bargain with the jury. Acting in his official capacity as prosecutor and as representative of the State, he held out to the jury a *promise* or induced an *agreement* by way of innuendo, that should the Petitioner be convicted, he would be considered for probation. After the guilty verdict was returned and it came time for the State to keep its end of the bargain, the court below refused to consider probation and sentenced the Petitioner to 5-10 years in the penitentiary.

It must be recognized that all of this comes as a direct consequence of the prejudicial comment made below!

The Petitioner now asks this Court, in light of the totality of the circumstances, if this form of conduct

constitutes *due process* and whether it is consistent with modern day notions of decency and fairness?

We respectfully submit that an enlightened sense of justice demands a *negative* answer.

Certiorari should be granted in this case in order to eradicate this form of prejudicial error from State criminal proceedings and to uphold respect for the constitutional guarantee of a fair and impartial trial which is so rooted in the traditions and conscience of our people as to be ranked as *fundamental.*

II.

CITIZENS WALKING THE STREETS OF THIS NATION SHOULD NOT BE MADE THE SUBJECT OF INDISCRIMINATE SPOTLIGHT SCRUTINY BY THE POLICE; THAT POLICE CONDUCT OF THIS NATURE SHOULD BE TEMPERED BY AN OBJECTIVE EVIDENTIARY STANDARD THAT WOULD WARRANT THIS FORM OF POLICE INTRUSION UPON THE PERSONAL SECURITY OF PRIVATE CITIZENS.

This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating what the policeman regards as suspicious circumstances. In the case at bar, the Petitioner and his companion were merely walking down a Chicago street at night, when they encountered the police officers involved in this case. Although the two of them were approximately 25 to 30 feet from the squad car, the officers testified that the street was sufficiently lighted to enable them to immediately recognize the Petitioner's companion as Ronnie Boland, a known narcotic user, who had previously been arrested by both officers. It was then that one of the officers threw the spotlight on

them and the squad car was stopped in the crosswalk blocking their path. Following this action by the officers the police testified they observed the Petitioner raise his hand to his mouth and then lower it to his waist and release a tin foil packet, which was later identified by the police as narcotics. (A. 32-36, 44-50, 17, 40; R. 52-59, 116-134, 20, 21, 86).

Petitioner argued in his brief to the court below that, under the circumstances of this case, the police use of a spotlight on him and the contemporaneous blocking of his path with a squad car constituted a forceful show of authority by the police that amounted to an unreasonable restraint and search of the Petitioner *before* the officers observed him discard the packet of narcotics.

However, the court below *misconstrued* Petitioner's argument and framed the issue as follows:

> "The crux of the issue is whether, after viewing this action by the defendant, the arrest that the officers subsequently made was based on the reasonable grounds that the defendant had committed or was now committing a criminal offense." (App. A).

In his petition for rehearing, the Petitioner called the court's attention to the fact that they had misinterpreted the issue raised and that the behavior by the police in this case had amounted to a search and seizure of the Petitioner *before* the heroin was discovered. Notwithstanding this, the court below denied the petition for rehearing. (App. C).

Therefore, in pursuing his only hope of recourse, the Petitioner now places before this Court a question of *first impression.*

UNDER THE FACTS OF THIS CASE, DOES THE POLICE USE OF A SPOTLIGHT ON CITIZENS ON THE STREET CONSTITUTE AN UNCONSTITUTIONAL SEARCH AND SEIZURE?

When viewed in light of contemporary social and ethical standards alone, this form of police harassment of citizens on the street should be condemned.

It must be recognized at the very outset that other parties, who are not represented here, are intimately affected by the issue before this Court. The many thousands of our citizens who have been or may be accosted by the police in the same manner as was the Petitioner in this case, only to be permitted to go in their way when the police do not observe any suspicious behavior, are not represented here. The records of their cases are not before the Court and cannot be brought here. Yet it is they, far more than those charged with crime, who will bear the consequences of this form of on-the-street encounter.

The street encounter as shown here is an example of the range of hostile confrontations between police and citizens generally occurring only in economically deprived neighborhoods. Such spotlight encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.

The proper adjudication of this case demands a constant awareness of the scope of the latitude being given to police officers thereby allowing wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain.

As this Court observed in *Terry* v. *Ohio*, 392 U.S. 1, when it stated:

> "The President's Commission on Law Enforcement and Administration of Justice found that '(i)n many communities, field interrogations are a major source of friction between the police and minority groups.' President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 183 (1967). It was reported that the friction caused by '[m]isuse of field interrogations' increases 'as more police departments adopt "aggressive patrol" in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.' Id., at 184. While the frequency with which 'frisking' forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation, and the particular officer, see *Tiffany, McIntyre & Rotenberg,* supra, n. 9, at 47-48, it cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the 'stop and frisk' of youths or minority group members is 'motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.'" *Id.*, n. 11, at 14.

The opinion of the court below now establishes precedent in Illinois that any man walking the streets of our cities, towns, villages, whether doctor, lawyer, priest, irrespective of any station in life, is the proper subject matter of a police spotlight for further observation and scrutinizing by the police establishment.

The citizen on the street needs the protection of the police, amply empowered, just as he needs protection

from them. He is the potential victim both of crime and of law enforcement. The very concept of indiscriminate spotlight scrutiny of citizens on the street by the police collides violently with the basic human right of liberty. It can be tolerated only in a society which is willing to concede to its government powers which history and experience teach are the inevitable accouterments of tyranny.

Our Constitution and Bill of Rights were designed to take government off the backs of people. They did not give us a welfare state. They were designed to make it difficult for the police, prosecutors, judges, juries, governors, presidents, and legislatures to do anything to the individual. That is the essence of his liberty—whether he be rich or poor, popular or despised. The question is not whether the Court at a given time is "soft" on this group or that. It is what hurdles the Constitution and Bill of Rights place in the path of the officials who pursue the individual. Hon. William O. Douglas, Managing the Docket of the Supreme Court of the United States, The Record of The Association of the Bar of the City of New York, May, 1970.

This Court has held that the Fourth Amendment protects people, not places. *Katz* v. *United States,* 389 U.S. 347, 351 (1967). In *Katz,* supra, this Court held that wherever an individual may harbor a reasonable "expectation of privacy", he is entitled to be free from unreasonable governmental intrusion. *Katz,* 389 U.S. at 361.

Unquestionably Petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Chicago. *Terry* v. *Ohio,* 392 U.S. 1, (1967). The question is whether in all the circumstances of this on-

the-street encounter, his right to personal security was violated by an unreasonable search and seizure.

Petitioner now urges this Court, as he urged the court below, to acknowledge that, in light of the circumstances of this on-the-street encounter, the police use of a spotlight on citizens on the street, constitutes a "seizure" and a serious intrusion upon the personal security of the individual.

In *Terry,* 392 U.S. n. 16, at 19, this Court delineated at what point a "seizure" is affected for purposes of the Fourth Amendment, when it stated:

> "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."

Petitioner contends that when the policemen in this case accosted him with their detective vehicle and their spotlight his liberty was restrained and he was "seized" within the meaning of the Fourth Amendment.

The spotlight is an integral part of the modern day policeman's arsenal which he employs to ferret out crime and maintain control and surveillance of the streets. The authoritative overtone implicit in the use of the police spotlight is a matter of common knowledge among the general populace, particularly in urban and economically deprived areas where its use is most prevalent. The placing of a spotlight upon an individual, under the circumstances of the instant case, is the officer's means of displaying a physical show of authority. The police spotlight to the man most likely to be the subject of scrutiny—the man on the street in a "bad" neighborhood, the man in the ghetto—is a challenge, an act of

dominion by the police, a thinly veiled threat of force. To hold otherwise is to suggest that the placing of a spotlight upon a citizen does not in some way restrain the liberty of the citizen. What law abiding citizen would be fearless enough—No! foolish enough—to ignore or attempt to break away from the authoritative focus of a police spotlight? But on the other hand, is it preferable to have our citizenry ignore the authority of the law, even if it does assume the form of a police spotlight? Hardly! Then what could a policeman do if the citizen did not stop? Would this justify the officer's use of greater force? Would this eventually lead to the concept that failure to stop when a spotlight is placed upon a citizen by an officer will justify the police use of firearms?

These questions *must* be posed because it is far from a "petty indignity" to be made the focal point of attention in public by the beam from a police spotlight and it is particularly offensive to the person in his own community who may be accompanied by members of his family or close friends. It is a serious intrusion upon the sanctity of the person, which may inflict great "indignity and arouse strong resentment, and it is not to be undertaken lightly." *Terry* v. *Ohio,* 392 U.S. at 16-17.

In *Terry,* 392 U.S. n. 14 at 17, this Court noted:

> "However, the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices."

A police spotlight by its very nature is not discerning. It sweeps within its ambit the affluent as well as the ghetto dwellers—the industrious as well as the idle

—the innocent as well as the guilty. Arbitrary spotlight scrutiny of citizens on the street epitomizes, and sets off a response to, many grievances harbored by the community. It undeniably arouses strong community resentment. Therefore, the Petitioner urges this Court to find that under the circumstances of this case the police conduct complained of here constituted a "seizure" of the Petitioner and a serious intrusion upon his personal security.

In addition, the Petitioner also asks this Court to find that the spotlight scrutiny by the police in this case constituted a "search" within the meaning of the Fourth Amendment. The Petitioner was clearly visible without the aid of a spotlight and he was doing nothing but simply walking on the public sidewalk. When the police officers turned their spotlight on the two men, it was to initiate their search and detention of the Petitioner's companion, who was known to them. They used their spotlight to examine and probe the Petitioner and his companion in hopes of discovering something that was *not* visible to them. This form of police conduct constituted a serious intrusion upon the Petitioner's right to personal security—his "right to be let alone."

In *Garcia* v. *Nelson;* U.S.D.C. N. Calif., 6/15/70, 7 Cr.L. 2327-28 a case almost identical to the one at bar, the district court held, in granting federal habeas corpus relief, that the defendant's admission that he had a "fix" earlier in the day took place after, and as a result of, an unlawful warrantless *flashlight* examination of his pupils by police who stopped him on the street. The court in *Garcia,* supra, stated:

> "The second possible ground for the arrest is the results of the flashlight examination of petitioner's

> eyes. A flashlight examination of one's eyes is certainly as abhorrent to the individual as a 'pat down' search. Both are intrusions upon the person. The Court in *Terry* v. *Ohio,* 392 U.S. 1, 24-25, had the following to say of such searches: 'Even a limited search of outer clothing for weapons constitutes a severe though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.' "

The Petitioner respectfully submits to this Court that it is no less abhorrent to the individual to be the subject of police spotlight scrutiny on the public streets nor is it any less of an intrusion upon cherished personal security. In addition, since the opinion of the court below is in contradiction to the federal district court's opinion in *Garcia* v. *Nelson,* supra., a conflict exists between the jurisdictions concerning a federally guaranteed constitutional right. This Court should resolve this conflict in its capacity as final arbitrator of disputes touching upon constitutionally guaranteed rights.

Therefore we ask this Court to approve the reasoning of *Garcia,* supra., and find that viewed in light of its surrounding circumstances, the conduct of the police officers in this case amounted to a "search" and "seizure" of the Petitioner for purposes of the Fourth Amendment *before* the packet of heroin was discarded by the Petitioner.

Should this Court so hold, then it must next be determined whether the police officers in the instant case had reasonable grounds upon which to warrant this intrusion.

In *Terry,* 392 U.S. at 21, this Court noted and cited authority, that before an officer intrudes upon an individual and in justifying the particular intrusion, the

police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrants that intrusion. In footnote 18, (392 U.S. at 21) this Court cited extensive authority for the proposition that this demand for specificity in the information upon which police action is predicated is the central teaching of Fourth Amendment jurisprudence.

Nowhere in this case at bar is there any information to justify the police intrusion in placing spotlight on the Petitioner and blocking his path with their squad car. The facts are in the record and not disputed by the prosecutor; the only reason for shining the spotlight on the Petitioner was because he was walking along with a man known to the police as a user of narcotics. In *Sibron* v. *New York,* 392 U.S. 40, this court noted:

> "The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security. Nothing resembling probable cause existed until after the search had turned up the envelopes of heroin. It is axiomatic that an incident search may not precede an arrest and serve as part of its justification. Thus the search cannot be justified as incident to a lawful arrest." *Id.,* at 62-63.

Clearly then in the case at bar, the police lacked any semblance of probable cause upon which to warrant their intrusion upon the Petitioner's personal security.

As this Court pointed out in *Sibron,* supra, that the police officer is not entitled to seize and search every person whom he sees on the street or of whom he

makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate reasonable grounds for doing so. *Sibron,* 392 U.S. at 64. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch", but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. *Terry,* supra, 392 U.S. at 27. The spotlight arrest by the police in this case was based on nothing more substantial than an inarticulate "hunch" premised upon guilt by association.

In *Terry,* supra, and the companion case of *Sibron* v. *New York,* 392 U.S. 40, this Court reviewed the investigative efforts of police officers who made observations of subjects for a period of time *before* acting. Unlike the actions of the Chicago Police in this case, who did no investigative effort or continued surveillance of the subject of their inquiry, but their first compulsive action was the initiating of the spotlight arrest of the Petitioner.

When asked why, since he recognized the Petitioner's companion, did he have to put the spotlight on them—the arresting officer testified; *"So we could see him a little better."* (A. 37; R. 66). With all due deference, we now ask Your Honors, is this probable cause or anything resembling probable cause upon which to warrant this type of serious intrusion upon the Petitioner's personal security? Is this sufficient justification to place him in an annoying, frightening, and no doubt humiliating situation? Hardly! When will law enforcement agencies heed the directives of this Court and operate as pro-

fessionals? Why could not the officers in this case have kept the Petitioner and his companion under appropriate observation until some specific articulable facts with rational inferences existed that would reasonably warrant police intrusion by spotlight or other police practice of search and seizure?

This Court should not permit this form of police intrusion to continue without subjecting it to the same objective evidentiary standard espoused in *Terry,* supra, where it was stated:

> "The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an *objective standard*: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? Cf. *Carroll* v. *United States,* 276 U.S. 132 (1925); *Beck* v. *Ohio,* 379 U.S. 89, 96-97 (1964). Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." (392 U.S. at 21-22). (Emphasis added)

Nowhere in the holding of the court below is there a showing that the Illinois Supreme Court has provided the review contemplated in the *Terry,* supra, opinion. Instead, the Illinois Supreme Court opinion ruled that the seizure of narcotics occurred prior to the Petitioner being placed under arrest, overlooking the police spotlight

issue of search and seizure as argued below. (Petitioner's brief, Argument I.).

Petitioner urges that this Court condemn the police tactics employed in this case and hold that the search and seizure of the Petitioner was in violation of his constitutional rights. As this Court in *Terry,* supra, noted:

> "Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing, or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials. And, of course, our approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate." (392 U.S. at 15).

Petitioner's arrest, trial and eventual conviction was the cumulative effect of the evils inherent in justice founded upon guilt by association. This was all too evident from the trial judge's concluding remarks below, when he stated:

> "The Court: He is a man (Petitioner) with a set of twins and a little baby and a wife and he should have kept better company. Wherever he met the individual he was very far from his home at the time. He was walking down the street with this individual (the known narcotics user). Certainly the company that you keep sometimes is a better judge

of what you are or what you yourself—" (A. 87; R. 274-275).

It is only fair to assume that if the trial judge below was inclined to infer guilt merely from the Petitioner's presence with a "bad" companion, then by the same token the jury was probably as equally disposed, if not more so, to infer Petitioner's guilt from his presence with another. The framers of our Constitution were aware of the evils inherent in justice founded upon guilt by association and they established constitutional safeguards designed to protect the individual against it. The spotlight arrest and eventual conviction of the Petitioner was premised upon guilt by association and therefore should be constitutionally condemned by this Court.

There is an additional characteristic of this spotlight confrontation between the police and the citizen on the street which merits particular attention. As was pointed out earlier in this petition, the authoritative overtones and natural implications associated with the police use of a spotlight on the individual are matters of common knowledge to the populace of this country. Therefore it is not difficult to perceive of everyday situations where the police, lacking the specific and articulable facts upon which to warrant an intrusion upon the individual, would employ their spotlight in hopes of creating circumstances which would justify their "suspicion" or "hunch" that the individual was involved in criminal activity of some nature. The sanctioning by this Court of the indiscriminate use of spotlights on the citizenry of this country would provide law enforcement agencies with an effective means by which to circumvent the guidelines carefully laid down in *Terry,* supra, by permitting the police to prod the object of their spotlight scrutiny into

creating the suspicious circumstances which would permit his "stop" and "frisk" and perhaps conclude in the eventual deprivation of his freedom.

For this Court to allow the citizenry of this country to be subjected to indiscriminate spotlight scrutiny, will affect the vital function that the judicial process is designed to implement, the function—"the imperative of judicial integrity." *Elkins* v. *United States,* 364 U.S. 206, 222 (1960). And foster the continued erosion of personal security. Courts which sit under our Constitution cannot and should not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered police use of fruits obtained by police conduct inconsistent with the fundamental rights of personal security of the individual. Therefore the Petitioner urges this Court to subject this form of police conduct to the same objective standards as espoused in *Terry,* supra.

Petitioner respectfully submits to this Court that his spotlight search and seizure was unlawful and that the admission of the narcotic packet in evidence violated his rights under the Fourth Amendment, made applicable to the States by virtue of the Fourteenth Amendment. *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

He prays that Certiorari be granted in this case in order to resolve the question of first impression presented herein and to settle the conflict of federal constitutional law being applied by the jurisdictions of Illinois and the Federal District Court in California.

CONCLUSION.

Petitioner prays that Your Honors will consider his complaints of sufficient constitutional magnitude to warrant this Court's review.

Respectfully submitted,

GERALD W. GETTY
Public Defender of Cook County

JAMES N. GRAMENOS
Assistant Public Defender

STEPHEN A. SNAKARD
Of Counsel
Room 1124, County Building
Chicago, Illinois 60602
(312) 321-6350

Counsel for Petitioner

APPENDIX A

Opinion Of The Supreme Court Of Illinois

Docket No. 41706—Agenda 8—January, 1970.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, *vs.*
VINCENT CIMINO, Appellant.

[Decided March 24, 1970]

MR. JUSTICE BURT delivered the opinion of the court:

The grand jury returned an indictment, in the circuit court of Cook County, against the defendant, charging him with the offense of possession of a narcotic drug in violation of section 3 of the Uniform Narcotic Drug Act. (Ill. Rev. Stat. 1967, ch. 38, par. 22-3.) Subsequent to this, an error was found in the indictment and after admonishment by the court as to the right to be reindicted properly, the defendant agreed to waive reindictment. The People then proceeded by information. The defendant then made a timely motion to suppress physical evidence that was obtained by the Chicago Police Department. After a hearing on the matter, the trial judge denied the motion and allowed the evidence to be introduced by the State. The jury returned a verdict of guilty and the defendant was sentenced to the penitentiary for a term of 5 to 10 years.

It appears from the record that on the evening of February 3, 1966, at approximately 11:30 P.M., the defendant and Ronnie Boland were on foot approaching the intersection of Bell and Potomac Streets in Chicago. At that moment, the police officers involved in the case were approaching the intersection in an unmarked vehicle. The two police officers testified that they recognized Ronnie Boland as a known narcotics user, and when the defend-

ant and Boland were approximately 20 to 30 feet from the squad car, one of the officers turned the spotlight on the two subjects. The officers then stated that they observed the defendant raise his hand to his mouth and then lower it to his waist and release a tin foil packet, the size of a quarter, which landed in the snow. One of the officers retrieved the packet and after determining that it appeared to be heroin, shouted to the officer to place the two subjects under arrest. The officers field tested the contents of the packet, which resulted in a positive reaction. Not having any narcotics in his possession, Boland was released from custody.

The first question for this court's attention is whether the packet of narcotics should have been introduced in the trial. The defendant contends that the police officers did not have probable cause to make a lawful arrest and as a consequence, the seizure of the heroin was unreasonable. The defendant has cited *People* v. *Roebuck,* 25 Ill. 2d 108, as authority for the contention that the motion to suppress the evidence should have been allowed in the trial court. However, we believe that the factual situation in that case was somewhat different from that in the case at bar. There the defendant was arrested without a warrant by two Chicago police officers for violation of a Chicago ordinance. Immediately following the arrest, as one of the officers was attempting to search the defendant, the other officer saw defendant throw an object into a parked car. The object was retrieved and was later identified as heroin. However, in the case before us, the defendant abandoned the narcotics before the police officers had placed him under arrest. The police officers testified that the defendant drop-

ped the packet only a few seconds after they had placed the light on the two subjects. The crux of the issue is whether, after viewing this action by the defendant, the arrest that the officers subsequently made was based on the reasonable grounds that the defendant had committed or was now committing a criminal offense. *People* v. *Wright,* 41 Ill. 2d 170; *People* v. *Peak,* 29 Ill. 2d 343, 347; *People* v. *Demarios,* 401 Ill. 146, 149.

We believe that the actions of the defendant gave the officers reasonable grounds for believing that he had, in fact, committed or was now committing a criminal offense. The existence of probable cause or reasonable grounds for arrest depend, of course, on the totality of the facts and circumstances of each case. (*People* v. *McCrimmon,* 37 Ill. 2d 40, 43.) Both of the arresting officers in this case were experienced narcotics personnel and observed the defendant throw away or drop the tin foil packet which, as was brought out in the course of the trial, is commonly used to carry heroin. This court in *People* v. *Watkins,* 19 Ill. 2d 11, 19, said: "Police officers often must act upon a quick appraisal of the data before them, and the reasonableness of their conduct must be judged on the basis of their responsibility to prevent crime and to catch criminals". The officers were reasonable in seizing the packet of heroin, and the arrest that ensued was based on probable cause.

The defendant also contends that the trial court violated his constitutional rights by subjecting him to double jeopardy when it improperly abandoned a valid indictment after the empaneling and swearing of the jury and substituted an information in lieu thereof. However, the

record indicates that the jurors had not been sworn and empaneled when the information was filed and sworn to. The record is clear that the empaneling of jurors continued after the defendant waived reindictment on advice of counsel and elected to be charged by the information. Thus, no jeopardy attached because no jury had been sworn or empaneled. (Ill. Rev. Stat. 1967, ch. 38, par. 3-4(a)(3); *cf. People* v. *Watson*, 394 Ill. 177, 180.) In conjunction with this argument the defendant contends that the waiver of reindictment was without an adequate understanding of the significance of the waiver. The record indicates that the defendant was represented by counsel, and that the trial court gave the defendant extensive admonishment concerning his rights to be charged by indictment. In fact, the defendant's attorney told him: "Do you understand they can go before a Grand Jury and get a reindictment inserting the word 'knowingly'? Then we would have to wait until you get a Jury again, sit in jail until you get the Jury, or we can waive it. They are going to put it in anyway. Do you want to go to trial?" In addition, the question is before us for the first time in that nothing was mentioned of it in the post-trial motion. The general rule is that the failure of a defendant to make an appropriate motion in the trial court, thus not preserving the question for review, is deemed to be a waiver of the question. (*People* v. *Burson*, 11 Ill. 2d 360, 370.) We find that the defendant waived reindictment with an adequate understanding of the significance of this action.

(Supreme Court Opinion)

The defendant next contends that the comment by the State's Attorney in his closing argument: "As a matter of fact, the defendant is eligible for probation on this case," denied the defendant a fair and impartial trial.

As this court said in *People* v. *Swets,* 24 Ill. 2d 418, 423: "While the comments exceeded the bounds of propriety, we do not think that under the circumstances of this case they were sufficiently prejudicial to call for a reversal. Where it appears that improper remarks do not constitute a material factor in the conviction, or that they are of such a minor character that prejudice to defendant is not their probable result, the verdict will not be disturbed." See also *People* v. *Berry,* 18 Ill. 2d 453, 458; *People* v. *Sustak,* 15 Ill. 2d 115, 126.

On defendant's motion for a new trial, the trial court was cognizant of this argument, and was in the best position to determine what effect, if any, it had upon the jury. We are not inclined to set aside its decision of the probable impact upon the jury. The judgment of the circuit court of Cook County is, therefore, affirmed.

Judgment affirmed.

MR. JUSTICE WARD took no part in the consideration or decision of this case.

(Supreme Court Opinion)

MR. JUSTICE SCHAEFER, dissenting:

In my opinion the argument of the prosecutor: "As a matter of fact the defendant is eligible for probation on this case," requires a reversal of the conviction. The majority makes no attempt to justify ths argument and its only purpose appears to be to diminish the jury's sense of responsibility by persuading them that a verdict of guilty is not a significant matter because even if he is found guilty ihe defendant is not going to be punished. (See *People* v. *Lynn* (1944), 387 Ill. 549; *People* v. *Klapperich* (1939), 370 Ill. 588; *Kelley* v. *State* (1936), 210 Ind. 310, 3 N.E. 2d 65; *People* v. *Smith* (1929), 206 Cal. 235, 273 P. 789.) This argument is, in my opinion, clearly and deliberately prejudicial even if the facts were as the prosecutor stated. In this case the error is compounded, however, by the fact that the prosecutor's statement was not true.

APPENDIX B

(Letterhead of)

STATE OF ILLINOIS
Office Of
CLERK OF THE SUPREME COURT
Springfield
62706

May 27, 1970

Hon. Gerald W. Getty
Public Defender of Cook County
118 N. Clark Street - Suite 1124
Chicago, Illinois 60602

In re: People State of Illinois, vs.
Vincent Cimino - No. 41706

Dear Mr. Getty:

The Supreme Court today made the following announcement concerning the above entitled cause:

> "On the Court's own motion the mandate is recalled and stayed pending disposition of petition for rehearing."

A certified copy of this order has today been forwarded to the Clerk of the Circuit Court of Cook County (Criminal Division).

Very truly yours,
/s/ Justin Taft
Clerk of the Supreme Court

APPENDIX C

(Letterhead of)

STATE OF ILLINOIS
Office Of
CLERK OF THE SUPREME COURT
Springfield
62706

October 6, 1970

Hon. Gerald W. Getty
Public Defender of Cook County
118 N. Clark Street
Chicago, Illinois

Dear Mr. Getty:

In Supreme Court today, in case No. 41706 entitled:

People State of Illinois,
appellee

vs.

Vincent Cimino,
appellant

Petition for Rehearing was: DENIED

Very truly yours,
/s/ Justin Taft
Clerk of the Supreme Court

APPENDIX D

Chapter 38, Illinois Revised Statutes, Criminal Law And Procedure, Section 22-40:

22-40. Penalties.] § 38.

* * * * *

Whoever violates this Act by possessing, having under his control, manufacturing, or compounding any narcotic drug shall be fined for the first offense not more than $5,000 and be imprisoned in the penitentiary for a period of not less than 2 years or more than 10 years. For any subsequent offense the violator shall be imprisoned in the penitentiary for any term from 5 years to life. Any offense under this Act is a subsequent offense if the violator has been previously convicted of an offense under this Act or any previous Act of this State relating to narcotic drugs or of a felony under any law of the United States or of the District of Columbia relating to narcotic drugs. No probation or suspension of sentence shall be granted to any violator who has been convicted of any subsequent offense.

* * * * *